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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SHERRY JOHNSON, Defendant and Appellant.	A151706 (Marin County Super. Ct. No. SC108820A)

Defendant Sherry Johnson appeals from an order denying her petition under Proposition 47 to designate her felony conviction of receipt of stolen property a misdemeanor. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 18, 1999, Johnson went to a branch of Bank of America in San Rafael and presented a check from Area West Insurance for $1,500 payable to Davina Roane.[1] Johnson identified herself as Davina Roane and offered a California driver's license in that name. The teller noticed a discrepancy between the signature card and the signature on the check. She checked the sequencing of checks for Area West Insurance Company and discovered that a number of checks, including the check Johnson presented, had been reported stolen two days earlier. Johnson was arrested at the bank.

[1] Because Johnson entered a plea, the facts are based on the probation report.

Johnson was charged with receiving stolen property, to wit, stolen checks belonging to Area West Insurance (Pen. Code,[2] § 496, subd. (a); count 1), commercial burglary by entering the Bank of America with intent to commit larceny (§ 459; count 2), forgery of a check by signing the name of another person (§ 470; count 3), false personation of another by presenting herself as "Davina Roane" (§ 529; count 4), possession of a blank bill or note (§ 475; count 5), and giving false information to a peace officer (§ 148.9, subd. (a); count 6).

On July 26, 1999, Johnson pleaded guilty to count 1, receiving stolen property, a felony, and count 6, providing false information to a police officer, a misdemeanor. The remaining charges were dismissed by plea agreement.

On April 12, 2017, Johnson petitioned to reduce the felony conviction for receiving stolen property to a misdemeanor under section 1170.18, subdivision (f). She noted that, although she had a stolen check written out in the amount of $1,500, the bank did not cash the check. Johnson referred the court to the recent Court of Appeal decision, *People v. Lowery* (2017) 8 Cal.App.5th 533 (*Lowery*), review granted April 19, 2017, S240615. Attached to Johnson's petition were the criminal complaint and probation report from 1999, as well as a copy of the *Lowery* decision. No other evidence was submitted to support the petition.

On June 14, 2017, the trial court held a hearing on Johnson's petition. Her attorney stated, "Your Honor, I think the case law states that the amount written on the check isn't dispositive of the total amount of the check, but I would submit on the papers."

The prosecutor objected to the petition. She argued, "The most recent case cited by both parties, *Lowery*, actually supports the [P]eople's position because I think that the defendant has failed to prove that that face value of that otherwise potentially negotiable check, there is no additional evidence that is less than the face value. And I would point the Court to the statement in People [v.] Lowery, 'We think a forged check may have a

[2] Further undesignated statutory references are to the Penal Code.

monetary value equal to its written value and the defense may present expert testimony if there is any foundation that it's less.' So here I think that the defendant is not eligible."

After confirming that the forged check was written out for $1,500, the trial court ruled, "I will find that the defendant is not eligible based on that. I don't see that any evidence has been provided to conclude that the face value of the check is not the actual loss amount."

DISCUSSION

"In 2014, the electorate passed initiative measure Proposition 47, known as the Safe Neighborhoods and Schools Act (the Act), reducing penalties for certain theft and drug offenses by amending existing statutes." (*People v. Gonzales* (2017) 2 Cal.5th 858, 863.) Section 1170.18 permits a person who has already completed her sentence for a conviction that would now be a misdemeanor under Proposition 47 to petition the court to have her conviction designated a misdemeanor. (§ 1170.18, subd. (f); *People v. Gonzales*, at p. 863.)

Johnson's 1999 felony conviction was for receiving stolen property in violation of section 496, an offense amended by Proposition 47. (§ 496, subd. (a); *People v. Perkins* (2016) 244 Cal.App.4th 129, 132–133 (*Perkins*).) Section 496, subdivision (a), now provides in relevant part, "Every person who buys or receives any property that has been stolen . . ., knowing the property to be so stolen or obtained, . . . shall be punished by imprisonment . . . . However, *if the value of the property does not exceed nine hundred fifty dollars* ($950), the offense shall be a misdemeanor . . . ." (§ 496, subd. (a), italics added.)[3]

"The ultimate burden of proving section 1170.18 eligibility lies with the petitioner. (See Evid. Code, § 500.) In some cases, the uncontested information in the petition and record of conviction may be enough for the petitioner to establish this eligibility. When

[3] In 1999, when Johnson committed the offense, receiving stolen property was a felony, but the district attorney had the discretion to charge the offense as a misdemeanor "in the interests of justice" if the value of the property did not exceed $400. (Former § 496, subd. (a), as amended by Stats.1997, ch. 161.)

eligibility is established in this fashion, 'the petitioner's felony sentence shall be recalled and the petitioner sentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).) But in other cases, eligibility for resentencing may turn on facts that are not established by either the uncontested petition or the record of conviction. In these cases, an evidentiary hearing may be 'required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.' [Citations.]" (*People v. Romanowski* (2017) 2 Cal.5th 903, 916 (*Romanowski*).)

"We review the trial court's construction of Proposition 47 de novo. [Citation.] We review any factual findings in connection with the court's ruling on the petition for substantial evidence." (*People v. Salmorin* (2016) 1 Cal.App.5th 738, 743 (*Salmorin*).)

Johnson contends the trial court applied the wrong standard for determining the value of the stolen check. She relies on *Romanowski, supra,* 2 Cal.5th 903. In *Romanowski,* our high court held that theft of access card account information in violation of section 484e, subdivision (d), was a theft crime eligible for misdemeanor classification under Proposition 47 when the value of the property taken does not exceed $950. (*Id*. at p. 910.) The *Romanowski* court went on to hold that the value of stolen access card information is determined by its "reasonable and fair market value" under section 484, which (since there is no legal market for stolen information) may be based on its value on the black market. (*Romanowski, supra,* 2 Cal.5th at pp. 914–915. ["When a defendant steals property that is not sold legally, evidence related to the possibility of illegal sales can help establish 'reasonable and fair market value.' "].)

The Attorney General argues that *Romanowski* is inapposite because Johnson was not in possession of stolen access information. Nor was she in possession of stolen *blank*

checks. (Cf. *United States v. Luckey* (9th Cir. 1981) 655 F.2d 203, 205.)[4] Rather, Johnson possessed a forged check written out in the amount of $1,500.

Forgery under section 473 is another offense that was amended by Proposition 47.[5] (*Salmorin*, *supra*, 1 Cal.App.5th at p. 743.) Courts are in conflict over how to determine the value of a forged check for purposes of Proposition 47 (see Couzens & Bigelow, Proposition 47, The Safe Neighborhoods and Schools Act (rev. May 2017), p. 32, <http://www.courts.ca.gov/documents/Prop-47-Information.pdf> (as of Sept. 5, 2018)), and the issue is pending before the California Supreme Court (*People v. Franco* (2016) 245 Cal.App.4th 679, review granted and opinion superseded, June 15, 2016, S233973; *Lowery*, *supra*, 8 Cal.App.5th 533, review granted April 19, 2017, S240615.)

In one view, the face value of a forged check establishes its value for purposes of the $950 threshold of Proposition 47 as a matter of law. For example, in *Salmorin*, *supra*, 1 Cal.App.5th at page 745, the court observed, "[F]or purposes of resentencing under Proposition 47, the value of a forged check is the face value of the check." Under *Salmorin*, evidence of the "market value" of a forged check on the black market is

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[4] In *United States v. Luckey*, *supra*, 655 F.2d at page 204, the defendant was charged with stealing a blank check from a bank. The question on appeal was whether there was sufficient evidence that the blank check had a value in excess of $100 when it was stolen. The Ninth Circuit Court of Appeals concluded there was no such evidence, noting, "There was no evidence introduced as to what the unenhanced blank check would have been worth on the 'thieves' market,' where the potential for enhancement [i.e., forgery] would have value to one capable of doing the enhancing." (*Id*. at p. 205.) Thus, a stolen blank check could only be found to be worth over $100 if the prosecution presented some evidence that a forger or other criminal might have valued the stolen blank check at over $100.

United States v. Luckey was cited by *Romanowski* as an example of courts using " a ' "black market" approach to valuation' " to determine the value of stolen property. (*Romanowski*, *supra*, 2 Cal.5th at pp. 915–916.)

[5] Section 473, subdivision (b), now provides in part, "any person who is guilty of forgery relating to a check, bond, bank bill, note, cashier's check, traveler's check, or money order, *where the value of the check*, bond, bank bill, note, cashier's check, traveler's check, or money order *does not exceed nine hundred fifty dollars* ($950), shall be punishable by imprisonment in a county jail for not more than one year . . . ." (Italics added.)

irrelevant; whether a person with a felony conviction for possession of a forged check is entitled to relief under Proposition 47 is determined solely by the face value of the forged check. (*Ibid*.)

Lowery, cited by Johnson in her petition, takes a different view. The *Lowery* court held, "[T]he term 'value' in Penal Code section 473 refers to the actual monetary worth of the [forged] check—that is, the amount the defendant could obtain for the check, not the amount for which it was written." (*Lowery*, *supra*, 8 Cal.App.5th at p. 541.) There, the defendant Lowery tried to cash a stolen check in the amount of $1,047 at a check cashing business, but he was unsuccessful. The cashier suspected the signature was not genuine and called the owner of the checks, who told the cashier not to cash the check. In 2010 (four years before Proposition 47 passed), Lowery pleaded no contest to possession of a forged check in violation of section 476.[6] After Proposition 47 passed, he petitioned to designate his forgery offense a misdemeanor under Proposition 47, and the prosecution stipulated to the petition. The trial court denied Lowery relief despite the stipulation, finding the offense of possessing a forged check for an amount over $950 was not eligible for relief. (*Id*. at pp. 536–537.)

The Court of Appeal concluded the trial court erred in finding that the check was worth its face value as a matter of law. (*Lowery*, *supra*, 8 Cal.App.5th at p. 541.) The court explained, "We think a forged check *may* have a monetary value equal to its written value. [Citation.] If Lowery had successfully cashed the check for its written value, this would be overwhelming evidence that it was worth its written value. But other extrinsic factors may be equally relevant to the determination such that an evidentiary hearing is required. A defendant may be able to introduce evidence showing the actual monetary value of the check is less than its written value. For example, a check may be so ineptly

[6] Section 476 provides, "Every person who makes, passes, utters, or publishes, with intent to defraud any other person, or who, with the like intent, attempts to pass, utter, or publish, or who has in his or her possession, with like intent to utter, pass, or publish, any fictitious or altered bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of any real or fictitious financial institution as defined in Section 186.9 is guilty of forgery."

forged that even the most credulous clerk would refuse to honor it. A poorly forged check for a million dollars is unlikely to be cashed, and it makes little sense to assign the written value to such a check. The more serious crime would consist of expertly forging a check for a thousand dollars. Allowing a defendant to present evidence that a forged check was not likely to be cashed is therefore consistent with the primary purposes of Proposition 47, which include reducing the number of nonviolent offenders in state prisons and reserving prison sentences for more serious offenders. [Citations.] A defendant might also be able to present evidence through an expert witness that a forged check has a monetary value less than its written value based on a discounted price paid on the street. [Citation.] Proposition 47 relief may also be summarily granted based on the face amount (for example where a forged check is written for less than $950), as it is virtually certain that the market value of a forged instrument would not exceed its face amount." (*Lowery, supra,* 8 Cal.App.5th at p. 541.)

The *Lowery* court held "the term 'value' in Penal Code section 473 refers to the *actual monetary worth* of the check," not necessarily the face amount of the forged check. (*Lowery, supra,* 8 Cal.App.5th at p. 541, italics added.) But the court did not conclude Lowery was entitled to relief under Proposition 47 based on the prosecutor's stipulation. Rather, the court remanded for an evidentiary hearing to determine whether he was entitled to relief. (*Ibid*.)

Here, Johnson sought relief under Proposition 47 expressly relying on *Lowery*. *Lowery* recognizes that "a forged check *may* have a monetary value equal to its written value," but the face value is not dispositive.[7] (*Lowery, supra,* 8 Cal.App.5th at p. 541.)

[7] To the extent Johnson may be arguing the face value of a forged check is *irrelevant* to determining its value for purposes of Proposition 47, we reject this argument. As we have seen, *Salmorin, supra,* 1 Cal.App.5th at page 745, holds the face value of a forged check is determinative. *Lowery, supra,* 8 Cal.App.5th at page 541, holds the face value of a forged check is *relevant* to determining its value but not dispositive. *Romanowski* (on which Johnson primarily relies on appeal) says nothing about how to determine the value of forged checks since the case involves stolen access card information, not forged checks. Johnson's petition would fail at the outset under

The *Lowery* court contemplated that a defendant petitioning for relief under Proposition 47 might be able to prove a forged check had a lower market value than its face value by presenting, for example, expert testimony that a forged check has a discounted price on the black market or evidence showing the particular forged check at issue was so poorly forged that it was unlikely to be cashed. (*Ibid*.) The Court of Appeal remanded because the defendant had not been given an opportunity to present such evidence.

In the present case, Johnson had the opportunity to present evidence at the hearing on her petition, but she offered no expert testimony or evidence regarding the state of the forged check, choosing instead to "submit on the papers." Her claim on appeal is that that the trial court applied the wrong standard for determining the value of the stolen check, but we see no error. The trial court did not rule that the amount of the forged check established its value as a matter of law. The court explained, "*I don't see that any evidence* has been provided to conclude that the face value of the check is not the actual loss amount." (Italics added.) In other words, the trial court found that Johnson failed to meet her burden to show the forged check was worth $950 or less. On the record before us, we cannot say this was error. (See *Perkins*, *supra*, 244 Cal.App.4th at p. 133 [affirming order denying petition for resentencing conviction of receiving stolen property as a misdemeanor "because defendant did not carry his burden to submit evidence of the value of the stolen property"].)

Johnson argues now that, given the risks of failure in cashing the forged check and a felony conviction if caught and the hypothetical expense involved in obtaining a false driver's license to carry out her scheme, she herself "must have calculated the stolen check . . . to be worth much less than the $1500 she tried to get with it." But (putting aside whether a defendant's own belief about the value of stolen property in her possession is probative of its value), this is speculation since Johnson did not submit any evidence on this point at the hearing.

Salmorin because the forged check in this case was written for $1,500. We will assume *Lowery* applies, however.

Johnson also argues that *Romanowski* recognizes that valuation of stolen property on the black market "will necessarily be speculative." We do not believe *Romanowski* can be read to excuse Johnson from presenting evidence on the value of the forged check in this case. The *Romanowski* court acknowledged there is a "somewhat greater challenge involved in estimating the dollar amount associated with" the theft of access card information, and "the value of intangible property may sometimes be more elusive than the value of tangible property" (*Romanowski, supra*, 2 Cal.5th at p. 911), but our high court did not suggest that speculation alone would be sufficient to establish the value of stolen access card information on the black market.

In sum, we affirm the trial court's order denying Johnson's petition to designate her felony conviction of receiving stolen property a misdemeanor because she failed to carry her burden to show the value of the forged check was $950 or less.

DISPOSITION

The order denying Johnson's petition to reduce her felony conviction to a misdemeanor is affirmed.

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Miller, J.

We concur:

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Kline, P.J.

_____
Stewart, J.

A151706, *People v. Johnson*